From: John Moore
To: microsoft.atr(a)usdoj.gov
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Subject: Microsoft Settlement

I would like to comment upon the proposed settlement between the United States Department of Justice and Microsoft. Since the company has been found both to be a monopoly and to be misusing the power inherent in that position, it would seem that any final result of the public's money and effort spent reaching this point should accomplish three things at a minimum: halting the illegal conduct of the company, promoting and restoring competition in the industry, and depriving the company of the gains it has accrued through its illegal conduct.

The proposed settlement fails to accomplish any one of these three goals.

In addition, the Court is aware that the original suit arises because of a difference of opinion regarding the effect of an earlier consent order. The wording of the proposed settlement appears vague to this software engineer. Even one unschooled in the law can spot huge holes which would permit Microsoft to evade the apparent intent of the document. From past behavior, this would likely lead to continued illegal activity. As an example, the proposed settlement allows Microsoft to define the "Windows Operating System." This means that it will be unfettered from employing the method of "bundling" additional functionality into the OS to attack future competition, just as it has attacked Netscape, Real Media, Apple Computers' QuickTime, and a near-endless list of others.

There is no economic incentive for a software company to expend the research and development time necessary to create a new application if its functionality can be bundled into Microsoft's definition of the "Windows Operating System." At the trial, Microsoft did not contest that it could define the operating system to include a ham sandwich if it desired. This is not appropriate and needs remedy.

The government's proposed agreement does provide that Microsoft cannot penalize some manufacturers if they offer to sell the application of a competitor. Unfortunately, it does permit Microsoft to offer inducements to a manufacturer to exclude competitors' products. It seems that under the proposed settlement, it would be illegal for Microsoft to--as an example--sell Windows to a manufacturer for $30 per PC if it didn't use competing software, but charge $100 if the manufacturer included competitors' products. On the other hand, nothing in the proposed agreement would seem to stop Microsoft from charging everyone $100 for Windows, but offering a $70 inducement if no competitor's products were used by the manufacturer. To someone who is not a legal scholar, this appears to be the same thing. It would undoubtedly have the same result--and would not restore competition.

A just settlement would not only prohibit penalties imposed by Microsoft to stop others' pro-competitive activities, but also prohibit it from offering any inducements which lead to the same result: exclusion of competition from other software companies.

As a professional software engineer, I can assure you that no settlement will truly promote competition unless it fully addresses what are known in the field as Application Programming Interfaces (most frequently abbreviated "API's"). In the past, Microsoft has used its

control over operating system API's to extend its monopoly. These APIs are not engraved in stone; they change. In the past, they have been deliberately changed by Microsoft to hamper other companies. Some of them were not even disclosed publicly until experts found that Microsoft applications were using "secret" OS calls to accomplish results that were otherwise impossible.

Likewise, I see nothing in the proposed settlement which will limit Microsoft's typical philosophy of "embrace and extend." This exercise of power, only possible to a monopoly, allows Microsoft to "embrace" an open and publicly-defined internet protocol and "extend" it--adding functionality that makes it work properly only with Windows clients. To allow for competition to exist, a Monopolist Microsoft should have to fully disclose all protocols and protocol changes to foster interoperability.

The proposed settlement will accomplish nearly nothing with regard to API's and protocols. Full disclosure is not mandated, and Microsoft will see any vagueness in a light that serves the company's interest. This is a highly technical area, but a solution is available and workable. No API is placed into the Windows Operating System without a purpose. There are documents inside Microsoft that detail what the API is supposed to do, and how it is to be used by programmers. To achieve full disclosure, all that need be done is to publish this information publicly--perhaps on the internet. API disclosure should not be limited to the Windows Operating System, but should also include Microsoft Office. Although this suite enjoys over ninety-five percent market share, it has not been addressed in the proposed settlement. This will allow Microsoft to evade the settlement's rules by simply moving functionality from Windows to Office, or offering special terms for Office that would not be allowed with Windows.

If an API should change during the development process, all the company should have to do is post the details of the change within a reasonable number of days. It would be possible to completely automate the process so that when details of the changes are placed in the proper electronic "folder" for internal sharing among developers those changes would instantly disseminate to the Web. This will not require any access to any part of the Windows source code, but it will level the development "playing field."

Another element of the proposed settlement is allowing Microsoft to retain the gains it has obtained through its browser monopolization. As a warning against future misconduct, I feel a just settlement would require full source-code disclosure of Internet Explorer. Since the PC interface seems to be migrating from the desktop to the Web browser, failure to do this will simply allow Microsoft to continue to do with Internet Explorer what it cannot do with Windows itself.

I will close by bringing up a point which worries me greatly. The original decree contained a prohibition against Microsoft from taking knowing action to disable or adversely affect the operation of competing application products. This seems to have totally vanished from the proposed settlement. Microsoft has done this sort of thing many times in the past. Unless this anti-competitive behavior is addressed by the Court, I fear this business practice will continue. Indeed, having gone to trial and been convicted, I feel that the proposed final settlement is nothing less than an invitation to continue "business as usual." It fails to provide even a meaningful penalty for failure to comply. The only penalty I see is an extension of the term for two more years.

Lacking any further penalties, why would Microsoft even care whether it chose to ignore these so-called "restrictions" for five years or seven?

I urge the Court to reject the proposed final settlement.

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